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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Intellectual property of indigenous peoples: concise report of the Secretary-General

1. By its resolution 1991/31 of 29 August 1991, the Sub-Commission on Prevention of Discrimination and Protection of Minorities requested the Secretary-General to prepare a concise report on the extent to which indigenous peoples can utilize existing international standards and mechanisms for the protection of their intellectual property, drawing attention to any gaps or obstacles and to possible measures for addressing them. It also requested the World Intellectual Property Organization to assist the Working Group on Indigenous Populations in formulating recommendations for the effective protection of the intellectual property of indigenous peoples.

2. The question of the protection of the intellectual property of indigenous peoples has been raised at successive sessions of the Working Group on Indigenous Populations. Recommendations on the issue are contained in the reports of the Working Group on its eighth and ninth sessions (E/CN.4/Sub.2/1990/42, annex I, para. 13 and E/CN.4/Sub.2/1991/40/Rev.1, annex I, para. 15). The draft declaration on the rights of indigenous peoples contains a reference to intellectual property. Draft operative paragraph 19 (see E/CN.4/Sub.2/1992/28) states:

> Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, medicines and knowledge of the useful properties of fauna and flora.

Furthermore, note can be taken of the discussion of intellectual property and indigenous knowledge at the Technical Conference on Indigenous Peoples and the Environment which took place in Santiago, Chile, from 18 to 22 May 1992 (see E/CN.4/Sub.2/1992/31).

I. INTELLECTUAL PROPERTY

3. Intellectual property is comprised of two main branches: industrial property, chiefly inventions, trademarks and industrial designs; and copyrights, primarily literary, musical, artistic, photographic and audiovisual works. The World Intellectual Property Organization (WIPO) is responsible for the promotion of the protection of intellectual property throughout the world. Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization (1967) refers to intellectual property as rights relating to (i) literary, artistic and scientific works; (ii) performances of performing artists, phonograms, and broadcasts; (iii) inventions in all fields of human endeavour; (iv) scientific discoveries; (v) industrial designs; (vi) trademarks, service marks, and commercial names and designations; (vii) protection against unfair competition; and (viii) all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

4. The principal international legal instruments for the protection of intellectual property are the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). The Paris Convention has been revised several times, most recently by the Stockholm Act (1967); the Berne Convention has also been revised by the Stockholm (1967) and Paris (1971) Acts. As of April 1992, 128 States were members of the World Intellectual Property Organization; as of January 1992, there were 103 States Members of the Paris Union and 90 States Members of the Berne Union.

II. CONCERNS OF INDIGENOUS PEOPLES

5. The intellectual property of indigenous peoples may be usefully divided into three groups: (i) folklore and crafts; (ii) biodiversity; and (iii) indigenous knowledge.

6. Folklore and crafts include various forms of oral literature, music, dance, artistic motifs and designs, crafts such as basketry, beading, quillwork, carving, weaving and painting. Indigenous peoples have expressed concern about the commercial exploitation of their folklore and crafts as well as about the reproduction by outsiders of certain cultural manifestations and objects of religious importance.

7. The biodiversity of the traditional territories of indigenous peoples may also be considered as part of the intellectual property of indigenous peoples requiring protection. Biodiversity refers, inter alia, to plant varieties which have been developed through experiment and cultivation for use as food, medicine or materials for house, boat or other kinds of construction or use.

There is concern that, as the biodiversity, especially of tropical forest regions, is destroyed through environmental mismanagement and population pressures, certain crops or products which can no longer be produced locally will be propagated under licence without recognition of the original cultivators.

8. Indigenous knowledge refers to the knowledge held, evolved and passed on by indigenous peoples about their environment, plants and animals, and the interaction of the two. Many indigenous peoples have developed techniques and skills which allow them to survive and flourish in fragile ecosystems without causing depletion of resources or damage to the environment. The various forms of sustainable development practised by indigenous peoples in forests, mountain and valley areas, drylands, tundra and arctic regions derive from a successful application of technology in agroforestry, terracing, resource management, animal and livestock controls, fish harvesting and in other areas. In particular, many indigenous peoples have a knowledge of plants suitable as medicines and this traditional medicine has been and continues to be a source for Western pharmacology. As noted by the World Commission on Environment and Development: "Tribal and indigenous peoples' lifestyles can offer modern society many lessons in the management of resources in complex forest, mountain and dryland ecosystems." 1/

9. The intellectual property of indigenous peoples, as it is understood in the foregoing paragraphs, may be the subject of a number of legitimate concerns. In the first place, there are certain moral and ethical considerations. As noted, specific designs or motifs of religious importance may be used by outsiders without the consent of indigenous peoples. Respect for indigenous culture requires respect for the symbols of their beliefs and religions.

10. Furthermore, it may also be argued that there is a largely unpaid moral debt to indigenous peoples for their contribution to the arts, sciences, technology and other areas of human knowledge and endeavour. There is little recognition of the contribution of indigenous cultures, through their music, story-telling, art and crafts, to the work of non-indigenous artists and thinkers. Nor is there full and proper recognition of the wide variety of plants developed by indigenous peoples for food, medicines and other purposes. The indigenous peoples of the Americas revolutionized European eating habits and provided varieties of foods which led to dramatic improvements in health and a subsequent rise in population. Plants such as the potato, beans, corn, tomato, coffee, cocoa, manioc, sunflower, squash and yam have all become staples of the modern diet. Furthermore, it is estimated, for example, that a quarter of all prescription drugs are derived from plants and that three quarters of these have been developed from information provided by indigenous peoples. 2/ In addition to medicines, other natural products developed by indigenous peoples such as organic pesticides, new varieties of crops, sweeteners and perfumes are in everyday use.

11. In the second place, there are also pecuniary considerations in connection with the intellectual property of indigenous peoples. While ethically it may be appropriate to recognize the historical debt of modern

society to the knowledge and "discoveries" of indigenous peoples, it may also be appropriate to consider ways of protecting and compensating the present-day knowledge of indigenous peoples. The estimated annual market value of medicines derived from medicinal plants discovered by indigenous peoples is several billion dollars. 3/ As scientists search for new drugs, crop varieties, or marketable plant by-products, the knowledge indigenous peoples possess of the biologically rich regions of the earth is the subject of research and may well, if not adequately protected, be the object of exploitation. As a very minimum, indigenous knowledge has and will continue to give vital clues to scientists, thereby saving them expensive research and development time.

12. Folklore is also subject to commercial exploitation. The World Intellectual Property Organization has observed:

> "The integrity of folklore as a living and functional tradition in developing countries is seriously endangered by the accelerating development of technology especially in the fields of sound and audiovisual recording, broadcasting, cable television or cinematography. Creations of folklore are not only being commercialized by such means on a worldwide scale without any respect for the cultural or economic interests of the communities which produced them; at the same time they are often also distorted in order to better comply with marketing requirements." 4/

III. PROTECTION UNDER EXISTING ARRANGEMENTS

A. Folklore

13. An attempt to protect works of folklore by means of a copyright instrument was undertaken at the international level during the revision of the Berne Convention at Stockholm (1967). As a result, article 15 (4) of the Paris Act (1971) of the Berne Convention contains the following provision:

> "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union."

14. However, copyright has proved an ineffective means of protecting folklore. By their nature, works of folklore evolve collectively and over time, making it difficult to fix their authorship or the moment of creation. Protection of copyright normally extends to the lifetime of the author and a short duration thereafter and does not, therefore, provide a long enough protection for folklore.

15. Another existing legal means for the protection of folklore is through the provisions concerning neighbouring rights, or the rights protecting performers, producers and broadcasters. The Rome Convention of 1961 for the

Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Convention of 1971 for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms both contain provisions which may be relevant. However, neither of these conventions prevents unauthorized performances of works of folklore or their reproduction.

16. Mention can also be made of national copyright legislation protecting folklore in Algeria, 1973; Bolivia, 1968; Chile, 1970; Côte d'Ivoire, 1978; Kenya, 1965; Morocco, 1970; Senegal, 1973; Tunisia, 1967 as well as annex VII to the Convention concerning the African Intellectual Property Organization.

17. It was the opinion of a series of committees of governmental experts on the intellectual property aspects of folklore, brought together by UNESCO and WIPO, that international and national arrangements were largely ineffective and that some model provisions for national laws were necessary. In 1982, WIPO adopted the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions. Article 2 of the Model Provisions defines expressions of folklore as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community". The provisions, if adopted as national law, protect folklore from "illicit exploitation and other prejudicial actions".

18. The Paris Convention for the Protection of Industrial Property provides protection for trademarks. It may be that motifs of indigenous peoples, especially those identifying particular groups, and even indigenous place names could be considered in this light. The Convention also contains a provision to prohibit unfair competition (art. 10 bis) which includes "all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor" and "indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods". The provision may be appropriate for the prevention of copies of certain craft products.

19. Finally, mention can be made of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, concluded in 1958 and revised in 1967 and amended in 1979. The Agreement provides for the protection of the "geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors" (art. 2). Appellations of origin - used to protect such familiar products as champagne or cognac - may be a means of protecting the distinctive products of indigenous peoples. As of 1 January 1992, only 16 States were party to the Agreement.

B. Biodiversity and indigenous knowledge

20. Indigenous peoples living in biologically diverse regions of the world possess a knowledge of potentially high economic value. They cultivate a wide variety of plants, many unknown and unused outside their community. In some parts of Amazonia, for example, while modern development exploits a mere 2 per cent of plant species and destroys the remaining 98 per cent, indigenous peoples have a use for nearly every existing species. Indigenous peoples have a profound knowledge of flora, fauna and animal life. They have also developed socially and ecologically viable strategies of natural resource use and management. Indigenous peoples may not see their knowledge of the natural world as a matter for economic evaluation, but the outside world pressing in upon them does. The extraordinary rich plant life of tropical forests in particular constitutes an untapped reserve of new medicines, dyes, insecticides and other natural products. Crop germplasms taken from traditional farmers may produce plant varieties of high commercial interest. Indigenous knowledge could also provide important directions for natural resource use and conservation, a major environmental challenge facing humanity. Indigenous people are thus becoming increasingly concerned about what they regard as the unauthorized use and abuse of their knowledge.

21. Existing international agreements on intellectual property appear largely inadequate to meet the concerns of indigenous people for protection of their traditional knowledge. As in the case of folklore, traditional knowldge is communal and transcends generations. A principal feature of patentability is that the the product or process should be new. The process must also be described in a way which makes it capable of reproduction.

21. None the less, certain international agreements may be relevant. The International Convention for the Protection of New Varieties of Plants (1961), for example, offers protection to the breeder of a new plant variety or to his successor in title. Under the Convention, authorization is required for purposes of commercial marketing. The right conferred on the breeder for a new plant variety or his successor is granted for a limited period, usually not less than 15 years. It may be possible, under the agreement, for indigenous peoples to register a plant which is traditionally grown as a new variety.

23. The Geneva Treaty on the International Recording of Scientific Discoveries (1978) defines scientific discovery as:

> "(i) the recognition of phenomena, properties or laws of the material universe not hitherto recognized and capable of verification;
> (ii) 'discoverer' means the natural person who has made a scientific discovery himself, through observation, study, experimentation or reasoning and in a manner decisive for arriving at the recognition thereof; where, in the making of a scientific discovery, several natural persons have jointly fulfilled the said requirements, any reference to a discoverer shall be construed as a reference to all of them."

The traditional knowledge that indigenous peoples have about the environment may be eligible as scientific discovery and thereby recorded.

24. It may also be possible to consider indigenous knowledge about ecosystems as a proprietary asset in the form of "know-how" or "trade secrets". Thus, the existence of a specific plant developed by indigenous people may be known but the way in which it is reproduced may not. In such cases know-how may be given contractual protection. However, indigenous peoples themselves must be in a position to withhold their knowledge until they negotiate satisfactory agreements on protection and remuneration.

25. Finally, reference can be made to the potential impact on indigenous peoples of developments in biotechnology. Biotechnology uses living organisms to make or modify a product or improve specific characteristics of plants or animals for commercial ends. It is now possible, through genetic engineering, to regenerate a whole plant from one of its cells or to fuse plants of different species to create a new entity. The Consultative Group on International Agricultural Research (CGIAR) and the Food and Agriculture Organization of the United Nations (FAO) have established the International Bureau for Plant Genetic Resources to conserve and research genetic resources. At the present time, there are 127 base collections of genetic material, of which only 17 are in the hands of the developing countries. 5/ There is now growing interest, particularly in the developed countries, in patenting modified life forms and preventing others from commercially exploiting them. Indigenous people, even though the cultivators of a wide variety of plants with distinctive chracteristics, may be the last to benefit from developments in biotechnology. It is possible that researchers identify commercially valuable plants on the territory and with the help of indigenous peoples, isolate the genetic material which gives the plant its special characteristics, patent and sell it.

IV. CONCLUDING COMMENTS

26. The protection of the intellectual property rights of indigenous peoples is complex and largely unresearched. Indigenous peoples are themselves not always aware that their cultural manifestations such as folklore or artistic products or knowledge about nature require protection to prevent their unjustified exploitation and abuse by outsiders. A greater understanding of the concerns of indigenous peoples on this issue may be needed before determining the specific legal remedies which might be appropriate,

27. Existing international agreements do not specifically address indigenous concerns. As suggested in resolutions 1990/59 and 1991/31 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, WIPO may be able to advise whether the interests of indigenous peoples can be protected by the Berne Convention (Paris Act), the Paris Convention (industrial property), the Geneva Treaty (scientific discoveries), the Budapest Treaty (microorganisms), the Madrid Agreement (trademarks), the Lisbon Agreement (appellations of origin), The Hague Agreement (industrial designs), the Model Provisions on folklore and other agreements. Other United Nations organizations, including UNESCO and FAO, may also have some comments to make on the matter.

28. If existing agreements do not protect the intellectual property rights of indigenous people, they may merit review and amendment. It may also be necessary to consider whether specific protection should be developed for indigenous peoples. In view of the fact that 1993 is the International Year for the World's Indigenous People, the appropriate United Nations organizations may wish to organize a working group of governmental and indigenous experts on the intellectual property of indigenous peoples in order to recommend future action.

29. The Special Rapporteur on the study of the cultural property of indigenous peoples, Ms. Erica-Irene Daes, may also wish to consider whether protection of folklore and other cultural products is a proper subject of her research. The Working Group on Indigenous Populations may also wish to take up the discussion on intellectual property and make recommendations.

30. Indigenous peoples lack the finance and the technical and human resources to enable them to record and register their intellectual property. Intergovernmental and governmental funds could be made available to assist indigenous peoples to carry out research and document their folklore and knowledge of plants.

Notes

1/ World Commission on Environment and Development, Our common future, Oxford University Press, 1987, p. 12.

2/ Gray, Andrew, Between the spice of life and the melting pot: Biodiversity conservation and its impact on indigenous peoples, International Workgroup for Indigenous Affairs (IWGIA), Document 70, 1991.

3/ Posey, Darrell, "Basic research into the topics and issues of intellectual property rights and just compensation for native peoples", project summary, 1990. Using data from the Fundaçao Brasileira de Plantas Medicinais, Brazil, Posey estimates that the annual value of medicines derived from plants discovered by indigenous peoples is US$ 43 billion.

4/ UNESCO and WIPO, "Commentary on the Model Provisions for National Laws on the Protection of Creations of Folklore", prepared by the International Bureau of WIPO (UNESCO/WIPO/WG.1/FOLK/2 Add., December 1979).

5/ Gray, op cit., p. 48.

Selected bibliography*

Convention of Paris for the Protection of Industrial Property (Paris, 1883).

Paris Convention for the Protection of Industrial Property: Act of Stockholm (Stockholm, 1967).

International Convention for the Protection of New Varieties of Plants (Paris, 1961).

Berne Convention for the Protection of Literary and Artistic Works (Berne, 1886, revised in 1967 and 1971).

Geneva Treaty on the International Recording of Scientific Discoveries (Geneva, 1978).

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (Budapest, 1977).

Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (UNESCO/WIPO, 1982).

Summary report of the International Workshop on Indigenous Knowledge and Community-based Resource Management, Winnipeg, Canada, September 1991.

Gray, Andrew. Between the spice of life and the melting pot: Biodiversity conservation and its impact on indigenous peoples (IWGIA), Document 70, Copenhagen, 1991.

Jabbour, Alan. Folklore protection and national patrimony: developments and dilemmas in the legal protection of folklore, Copyright Bulletin, 1983, pp. 10-14.

Posey, Darrell, Indigenous knowledge and development: an ideological bridge to the future, Ciencia e Cultura, 1983, 35 (7), pp. 877-894.

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* The selected bibliography represents the sources used in the preparation of this report and is not comprehensive.